IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1497

LORETTA FAY BECK, *Petitioner*

vs.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent*

Petition for Rehearing

Petitioner respectfully moves this Court to vacate its order denying the petition for writ of certiorari entered October 10, 1972 and to grant the petition. As grounds for this motion petitioner would show the Court as follows:

1. The Court of Appeals for the Fifth Circuit made an "*Erie guess*" and substituted its unsure prediction of the Texas law for that of the Trial Judge who sits and has practiced for many years in the Texas Courts.[1]

[1]See: *The Law of Federal Courts* by Chas. Alan Wright, 2d Ed. 1970, p. 240, 2nd column:

"As a general proposition, a federal court judge who sits in a particular state and has practiced before its courts may be better able to resolve complex questions as to the law of that state than is some other federal judge who has no such personal acquaintance with the law of the state. For this reason federal appellate courts have frequently voiced reluctance to substitute their own view of the state law for that of the federal judge. As a matter of judicial administration, this seems defensible. But there is some tendency to go beyond that, and to say that if the trial court has reached a permissible conclusion under state law, the appellate court cannot reverse even if it thinks the state law otherwise, thus treat-

It held that waiver and estoppel would not be applied today against an insurance company by the Texas Supreme Court. The Fifth Circuit cited but refused to follow five Texas decisions.[2] It made no attempt to distinguish between the cases cited in its opinion, but concluded:

> "Although the former two cases clearly raise a doubt as to what the Supreme Court of Texas would hold the applicable rule of law to be today, we continue to believe our initial *Erie* guess to be the correct prediction and therefore adhere to our original decision."

2. Since the date of the Fifth Circuit's decision two decisions have been reported which are in direct conflict with the decision herein. The Fifth Circuit did not have the benefit of these later opinions when it made its "*Erie* guess" that waiver and estoppel have no application in Texas. The language in point from each of the new cases is quoted:

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ing the question of state law much as if it were a question of fact. It would seem that a party is entitled to review the trial court's determination of state law just as he is of any other legal question in the case, and that the decision of the local trial judge cannot reasonably be regarded as conclusive."

[2]The five cases which the Fifth Circuit rejected are: *Texas Prudential Insurance Co. v. Dillard*, Tex.Sup.Ct. 1957, 307 S.W. 2d 242; *Legal Security Life Ins. Co. v. Erwin*, Tex.Civ.App. – Texarkana – 1963, writ refused, n.r.e., 372 S.W. 2d 750; *National Aid Life Ass'n v. Murphy*, Tex.Civ.App. 1934, 78 S.W. 2d 223, writ dismissed; *Terry v. Texas Prudential Insurance Co.*, Tex.Civ.App. 1934, 77 S.W. 2d, writ dismissed; *Southern Underwriters v. Jones*, Tex.Civ.App. 1929, 13 S.W. 2d 435, writ refused.

Case One: Minnesota Mutual Life Ins. Co. v. Morse (Tex.Civ.App. — Texarkana — 1972) 476 S.W. 2d 753, 758, rehrg. den. Feb. 22, 1972.

"Points 5 through 10 as raised by Appellant had to do with waiver and estoppel. *** We think the provisions of the group insurance policies bring them clearly within the provision of waiver and estoppel. *Legal Security Life Ins. Co. v. Erwin*,[3] Tex.Civ.App. 1963, 372 S.W. 2d 750, Writ ref'd., n.r.e., and the authorities cited therein."

Case Two: Republic Ins Co. v. Silverton Elevators, Inc. (Tex.Civ.App. — Amarillo — 1972) 477 S.W. 2d 336, Rehrg. denied March 13, 1972 (p. 337).

"Under such circumstances, our Supreme Court early held in *The Liverpool & London & Globe Ins. Co. v. Ende*, 65 Tex. 118 (1885), that the insurance company waived *** and is estopped from denying liability *** (p. 338). The rationale for the rule is that an insurance company may not deliver a policy with full knowledge of facts upon which liability thereunder may be disputed, and then insist upon these facts in avoidance of the liability undertaken. Such course of action is an assertion that the policy is valid at time of delivery and is a waiver of the known ground of invalidity by which the insurer is estopped from defeating an action brought on the policy by that defense."

3. On June 14, 1972, after filing of the petition for

[3]The Fifth Circuit cited the *Erwin* case in the opinion on rehearing, but refused to follow it.

certiorari herein, the Texas Supreme Court granted writs of error to review the decisions of the Courts of Civil Appeals in *Minnesota Mutual Life Ins. Co. v. Morse* and *Republic Ins. Co. v. Silverton Elevators, Inc.* On July 17, 1972, the Texas Supreme Court heard oral arguments in these cases and the Texas Supreme Court opinions are expected at any time. The original certificate of the Clerk of the Supreme Court of Texas is filed herewith and a copy is attached hereto as "Appendix A". Even if the Federal Courts no longer feel bound by the opinions of the Texas Courts of Civil Appeal, there is no reason to guess or speculate on the Texas law in view of the impending decisions of the Texas Supreme Court.

It has been two years since this case was tried and petitioner recovered judgment against Connecticut General. One year ago the Court of Appeals reversed the judgment, made its "*Erie* guess" which permitted Connecticut General to keep the insurance proceeds *and the premiums* — a shocking departure from all standards of justice.

4. While Petitioner realizes that the granting of a writ of certiorari is a matter of grace and not of merit, there is a dangerous precedent in the Fifth Circuit's opinion which should be excised. Although not clearly stated, the decision of the Fifth Circuit did not turn on the insurer's "knowledge" that the policy was worthless at the time it was sold — the single element which determines whether or not the transaction was fraudulent. Obviously, the Fifth Circuit failed to recognize an old fashioned fraud.

FRAUD SANCTIONED BY THE FEDERAL COURTS

A layman need not understand the theories of waiver and estoppel to recognize that it is fraud to permit an insurance company to knowingly sell a worthless policy. Try explaining to a layman that the Fifth Circuit permitted Connecticut General to keep the proceeds and the premiums, too. Without realizing that learned judges can also make mistakes, a layman will likely question the integrity of the court. Historically, the Supreme Court of Texas has refused to sanction this kind of fraud. The language chosen by the Fifth Circuit to deny petitioner's claim is broad enough to hide the fraud of Connecticut General as well as the fraud of other insurance companies. How many times will this decision be cited as an authority to sanction the fraud of an insurer?

In view of the cases now pending in the Texas Supreme Court, would not justice be best served and the integrity of the courts maintained, if the petition for certiorari were granted and this case returned to the Fifth Circuit for its further consideration?

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant a rehearing of the order of denial, vacate that order, grant the petition for certiorari and review the judgment and opinion below or, in the alternative, reverse and remand this

cause to the Court of Appeals for further consideration.

Respectfully submitted,

BILL ATKINS
407 Arlington Bank & Trust Building
P. O. Box 248
Arlington, Texas 76010
Attorney for Petitioner

CERTIFICATE OF COUNSEL

As counsel for petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

Counsel for Petitioner

CERTIFICATE OF MAILING

I, Bill Atkins, attorney of record for petitioner, do hereby certify that the foregoing Petition for Rehearing has been served upon Respondent, Connecticut General Life Insurance Company, by depositing true copies of the same in a United States mail box, postage prepaid, properly addressed to its attorney of record, Thos. H. Law, Law, Snakard, Brown & Gambill, 1500 Fort Worth National Bank Building, Fort Worth, Texas 76102.

Bill Atkins

APPENDIX A

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the application for writ of error in the case of THE MINNESOTA MUTUAL LIFE INSURANCE COMPANY VS. ETHEL C. MORSE, EXECUTRIX, ET AL, No. B-3318, from the Sixth District, Bowie County and the application for writ of error in the case of REPUBLIC INSURANCE COMPANY VS. SILVERTON ELEVATORS, INC. ET AL, No. B-3333, from the Seventh District, Briscoe County were both granted on June 14, 1972 and were submitted and argued orally on July 19, 1972, and as of this date these two cases are still under submission and no opinions have been delivered.

IN WITNESS WHEREOF, Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, Texas, on Oct. 30, 1972.

GARSON R. JACKSON
Clerk
/s/L. R. ADKINS
By L. R. Adkins
Deputy

[SEAL]

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Addendum to Petition for Rehearing

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 24(5), Petitioner would call this Court's attention to the decision of the Supreme Court of Texas in *Minnesota Mutual Life Ins. Co. v. Morse.* The new decision is in conflict with the *"Erie guess"* made by the Fifth Circuit to the effect that a good health clause cannot be waived and the insurance company cannot be estopped to assert it.[1]

On rehearing the Fifth Circuit cited but refused to

[1]The Fifth Circuit's opinion contains the following language which is in conflict with the latest Texas Supreme Court decision:

"The usual 'good health' clause in a life insurance policy provides that the policy is null and void if the insured is not in good health at the time the policy is delivered to him • • • Appellee Beck contends, however, that this condition precedent can be waived or that the company can be estopped to assert it. This is not the law of Texas • • • "

follow *Legal Security Life Insurance Co. v. Erwin*, 372 S.W. 2d 750, writ ref. n.r.e. and *Texas Prudential Insurance Co. v. Dillard*, 307 S.W. 2d 242 (Tex. 1957). It "*guessed*" that the Texas Supreme Court would *today* reject these rules on waiver and estoppel.[2]

THE TEXAS SUPREME COURT HOLDS THAT AN INSURANCE COMPANY MAY WAIVE AND CAN BE ESTOPPED FROM ASSERTING A POLICY REQUIREMENT.

The opinion of the Texas Supreme Court in *Minnesota Mutual Life Insurance Co. v. Morse* was delivered on November 15, 1972, and has not been reported. A certified copy of the opinion is enclosed with this addendum. The judgment of the Court of Civil Appeals was reversed because the facts necessary to invoke waiver and estoppel were missing; however, Justice Reavley states (p. 5):

> "Whereas *waiver* and *estoppel may operate* to avoid forfeiture of a policy *and may prevent an insurance company from avoiding payment because of the failure of the insured to comply with some requirement of the policy*, waiver and estoppel cannot enlarge the risks covered by a policy *** " (Emphasis supplied)

In this instance the Fifth Circuit's prediction was wrong—the Supreme Court of Texas did not overrule, qualify or restrict the application of the rules on waiv-

[2]The Fifth Circuit uses the following excuse for ignoring these decisions:

"Although the former two cases clearly raise a doubt as to what the Supreme Court of Texas would hold the applicable rule of law to be today, we continue to believe our initial *Erie* guess to be the correct prediction and therefore adhere to our original decision."

er and estoppel as set forth in the *Dillard* and *Erwin* cases. These cases, along with the other cases cited and relied upon by Petitioner correctly state the Texas law. The federal courts can no longer find an excuse for not following these decisions.

Historically, the Supreme Court of Texas has called it *fraud* for an insurance company to insist on a policy requirement to avoid payment when it delivered the policy with knowledge that the requirement had not been met. *Liverpool & London & Globe v. Ende*, 65 Tex. 118, 123 (Tex. 1885).

In view of the latest statement of the Texas Supreme Court, why would the federal courts deliberately choose to become a party to the fraud committed by Connecticut General?

Petitioner respectfully prays that this Court grant a rehearing, that her petition for certiorari be granted and the judgment reversed, and/or that this case be remanded to the Court of Appeals for its further consideration in light of the latest decisions of the Texas Supreme Court and the Texas Courts of Civil Appeals.

Respectfully submitted,

BILL ATKINS
407 Arlington Bank & Trust Bldg.
P. O. Box 248
Arlington, Texas 76010
Attorney for Petitioner

CERTIFICATE OF COUNSEL

As counsel for petitioner, I hereby certify that this Addendum to Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

Bill Atkins

Counsel for Petitioner

CERTIFICATE OF MAILING

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